TAN BENG SOOI

v.

PENOLONG KANAN PENDAFTAR
(UNITED MERCHANT FINANCE BHD INTERVENER)

HIGH COURT MALAYA, JOHOR BAHRU
TUAN LOW HOP BING JC
[ORIGINATING SUMMONS NO. 24-168 OF 1994]
29 OCTOBER 1994

PRACTICE & PROCEDURE: *Application for declaratory judgment - Whether premature and irregular - Principles applicable - Order 15 r. 16 Rules of the High Court 1980.*

PRACTICE & PROCEDURE: *Declaratory relief - Doctrine of prospective overruling - Prevention of difficulty hardship or inconvenience - Inherent jurisdiction of Court - Order 92 r. 4 Rule of High Court 1980.*

INTERPRETATION: *Statutory interpretation - Construction of delegated legislation - Canons of interpretation - Rule 7(a) and 7(b) Auction Sale Enactment Rules.*

SALE OF LAND: *Remuneration of auctioneer - Abortive sale - Circular dated 6 August 1992 issued by Senior Assistant Registrar, High Court - Whether ultra vires the Auction Sales Enactment 1932 - Rule 7(6) Auction Sales Enactment Rules.*

The applicant is a licensed registered auctioneer under the Auction Sale Enactment 1932. On 10 January 1993 he conducted an auction for properties in Pulau Pinang at a reserve price of RM6,000,000. He sent a bill to the Deputy Registrar, High Court Johor Bharu for RM16,015.50 but was paid only RM908 in settlement thereof. On 31 July 1993 he again conducted an abortive auction at the same reserve price for which he forwarded a bill for RM15,573.50 to the said Deputy Registrar. He was paid a sum of RM466 in settlement thereof. The applicant based his bills on Rule 7(6) of the Auction Sales Enactment Rules which provided that the remuneration shall be based on the reserve price.

The Deputy Registrar admitted that the payments made to the applicant were based on a circular of the Senior Assistant Registrar dated 6 August 1992 by which auctioneers were paid a fixed commission of RM100 and disbursement for each abortive auction.

The applicant then filed this application for a declaration for his rightful remuneration and the issues were the proper construction of Rules 7(a) and (b) of the Auction Sales Enactment Rules and whether the circular dated 6 August 1992 was *ultra vires* Rule 7(b). The defendant argued that Rule 7(b) was applicable only when the reserve price is kept secret and bidding has started but the reserve price is not reached, and further that, when the auction is cancelled or adjourned by the Court the Deputy Registrar has a discretion to prescribe the fees pursuant to Rule 7(a) or under the inherent jurisdiction of the Court. The defendant also raised a preliminary objection that the application was premature and irregular.

Held:

[1] Under O. 15 r. 16 RHC 1980 the Court's power to make a declaratory order is unlimited, subject only to its own discretion. The Court has power to grant such order even if applicant does not have a cause of action or even if it does not yet exist.

[2] It is an established practice that the reserve price is stated in the Proclamation of Sale and its openness is statutorily founded. Imposing an element of secrecy as a precondition of Rule 7(b) is unsupportable.

[3] The words in Rule 7(b) "...where property is put up by public auction..." must be given the ordinary natural meaning which contemplates that the auction has already commenced. This means the reserve price is disclosed.

[4] There has been no proper exercise of the defendant's discretion to reduce the fees payable under Rule 7(b) to Rule 7(a) or the circular. The discretion under Rule 7(a) has to be exercised after considering the merits judicially and giving the auctioneer an opportunity to present his views.

[5] The inherent jurisdiction of the Court under O. 92 r. 4 RHC 1980 cannot be used to deny the applicant of any legal right vested in him by virtue of Rule 7(b). Inherent jurisdiction under the rules of Court is a procedural rule and is not intended to alter substantive rights. The inherent jurisdiction of the Court must be applied to do justice to the parties and to secure fairness in a trial between them but not for any other purpose such as taking away the substantive rights of the auctioneer in this case.

[6] In issuing the circular reporting to purchase fees for licensed auctioneer in Johor Bharu High Court, the Deputy Registrar has exceeded her power under the Auction Sale Enactment 1932 or the Rules made thereunder. The circular is therefore *ultra vires* the Enactment and the Rules and is null and void and of no effect.

[7] The doctrine of prospective overruling is applied so that fees claimed by auctioneers before this judgment will be undisturbed and unaffected. This judgment is effective only for auction sales conducted on or after the date of this judgment.

[Application allowed].

Cases referred to:
Hirendra Lal Bannerji v. Chin Cheng Realty (Pte) Ltd. [1986] 1 MLJ 220 ***(refd)***
Ipoh Town Council & Anor. v. Ng Khoon Khoon (NO. 2) 1960 MLJ 227 ***(refd)***
United Malayan Banking Corporation Berhad v. Indah Sejati Sdn. Bhd. [1992] 1 AMR 41 ***(refd)***
Re Wolfe, Heller v. Wolfe [1952] 2 AER 545 ***(refd)***
Supputetchimi a/p Karpaya v. Palmco Bina Sdn. Bhd. [1994] 2 CLJ 561 ***(refd)***
PP v. Dato Yap Ping [1983] 2 MLJ 311 at 320 & 323 ***(foll)***

Legislation referred to:
Auction Sales Enactment Rules rr. 7(a) & (b) & 5
Auction Sales Enactment 1932, ss. 4, 4(d), 4(iv), 12 & 12(a)
National Land Code 1965 s. 257(d)
Rules of the High Court, 1980, O. 15 r. 16, O. 59 r. 34 & O. 92 r. 4

Other source referred to:
Mallal's Supreme Court Practice, Tan Sri Chang Min Tat

For the plaintiff - M/s. Gana Muthusamy & Co.
For the defendant - Mohd. Zawawi bin Salleh, SFC

JUDGMENT

Low Hop Beng JC:

A. *Application*

This is an application by the plaintiff for the following orders:

1. A declaration that the circular dated 6 August 1992 issued by the Senior Assistant Registrar Johor Bahru to Licensed Auctioneers, High Court, Johor Bahru is *ultra vires* r. 7(b) of the Auction Sales Enactment Rules and is by reason thereof void and of no effect.

2. A declaration that the abortive costs for the auction in relation to the sale of the property known as Lots No. 512 and 513, Title Nos. 35957 and 35958 respectively in the Daerah Timur Laut Negeri. Pulau Pinang at the reserve price of RM6,000,000 under r. 7(b) of the Auction Sales Enactment Rules is RM16,015.50.

3. A declaration that the abortive costs for the auction in relation to the sale of the property known as Lots 512 and 513 Title Nos. 35957 and 35958 respectively in the Daerah Timur Laut Negeri Pulau Pinang (hereinafter referred to as "the subject properties") at the reserve price of RM6,000,000 under r. 7(b) of the Auction Sales Enactment Rules is RM15,573.50.

4. If the above declarations are allowed, then the defendant be ordered to pay to the plaintiff the auctioneer's fees which have not been paid.

5. That the costs of these proceedings be borne and paid by the defendant.

B. *Preliminary objection on the grounds that the application is irregular, premature and/or abuse of the process of Court.*

Learned Counsel for the intervener submitted that the application herein for declaration is irregular, premature and/or an abuse of the process of the Court, since the applicant has not exhausted the remedy under O. 59, r. 34 for the matter to be taxed by the Registrar of the Court.

Counsel for the plaintiff holds a contrary view.

In my considered opinion, this preliminary objection has no merit. Under O. 15, r. 16 of the Rules of the High Court,

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or nor consequential relief is or could be claimed.

The scope of this rule has received the following commentary in *Mallal's Supreme Court Practice* by Tan Sri Chang Min Tat and it reads as follows:

> Scope of the rule: The jurisdiction to make a declaration under the rule is not confined to cases in which the plaintiff has a complete and subsisting cause of action apart from the rule, or, in which the plaintiff also seeks relief apart from the declaration: *Guaranty Trust Co. of New York v. Hannay* [1915] 2 KB 536 CA. A declaration can be resorted to ascertain and determine the rights of parties or to determine a point of law or in place of an order of *certiorari*, especially where the time to apply for the prerogative order has expired: *Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 MLJ 135 FC, *Pyx Granite Co. Ltd. v. Ministry of Housing & Local Government* [1960] AC 260; [1959] 3 All ER 1 HL(E) followed.

Further in the recent well considered judgment of Dr. Zakaria bin Yatim, J in *Mahesan a/l Subramaniam & 2 Ors., v. Ponnusamy a/l P. Rajoo & 3 Ors.* [1994] (3) AMR 44 at p. 2296 after referring to and analysing numerous authorities including the judgment of the Federal Court in *Datuk Syed Kechik bin Syed Mohamed v. Govt. of Malaysia & Anor*. [1979] 2 MLJ 101, pertaining to the powers of the Court to grant a declaratory judgment concluded that the Court's jurisdiction to make a declaratory order is unlimited, subject only to its own discretion. The Court has the power to grant a declaration irrespective of whether the applicant has a cause of action or not. The Court has the discretion to grant a declaration even if the cause of action does not exist at the time of the filing of the application.

On the foregoing grounds, I overrule this preliminary objection and hold that the application is regular and hence not an abuse of the process of the Court and that this Court has jurisdiction to make a declaratory order.

C. *Agreed issues for the determination of the Court*

The parties herein have agreed that the issues to be determined by the Court are as follows:

(a) What is the proper construction of r. 7(a) and (b) of the Auction Sales Enactment Rules?

(b) Whether the Senior Assistant Registrar's Circular dated 6 August 1992 is *ultra vires* r. 7(b)?

1. *Rule 7 of the Auction Sales Enactment Rules*

This rule reads as follows:

(a) Where the order for sale by public auction is cancelled or the sale is postponed by order of Court before the completion of the sale the remuneration of the auctioneer shall be at the discretion of the taxing officer.

(b) Where property is put up by public auction but no sale takes place by reason of the reserve price not being reached the auctioneer shall receive half the commission which would have been payable under r. 5 calculated on such reserve price.

2. *Facts of this case*

These facts which are not disputed may be summarised as follows:

(1) The applicant is a licensed registered auctioneer under the Auction Sales Enactment 1932.

(2) On 10 January 1993, the applicant was the auctioneer conducting an auction for the subject properties at the reserve price of RM6,000,000.

(3) The said auction was abortive as there was no bidder. The auctioneer then sent a bill for RM16,015.50 to the Deputy Registrar of the High Court Johor Bahru, based on r. 7(b) above.

(4) On or about 12 June 1993, the auctioneer received a cheque from the Treasury for the total sum of RM908 in settlement of the said bill.

(5) On 31 July 1993, the auctioneer was also the auctioneer conducting an auction for the subject properties at the reserve price of RM6,000,000.

(6) The said Auction was abortive again as there was no bidder. Consequent thereto, the auctioneer sent a bill for RM15,573.50 to the Deputy Registrar of the High Court Johor Bahru, based on the said r. 7(b).

(7) On or about 16 November 1993, the auctioneer received a cheque from the Treasury for the sum of RM466 in settlement of the said bill.

(8) The auctioneer believed that his auction fees for the said abortive sales were calculated on the basis of the said circular dated 6 August 1992, which the applicant believes is *ultra vires* the Auction Sales Enactment 1932 and Auction Sales Enactment Rules made thereunder.

(9) The Deputy Registrar of the High Court Johor Bahru admitted that the above cheques were paid on the basis of the said circular, under which the applicant was paid a fixed commission of RM100 (apart from disbursements) for each of the above abortive auctions.

3. *Defendant's contention*

The defendant opines that the plaintiff's claim has no merit as r. 7(b) is only applicable:

a) where the reserve price is **kept secret**;

b) bidding has started but reserve price has not yet been reached; and

c) there is no sale as the reserve price has not been reached.

In the circumstances, the defendant says that where the auction is cancelled or adjourned by the Court, the Deputy Registrar has a discretion to precribe the fees, pursuant to r. 7(a) or alternatively under the inherent jurisdiction of the Court pursuant to O. 92, r. 4 of the Rules of High Court, 1980.

4. *Construction of Rule 7(a) and (b)*

1. *Rule 7(b)*

Upon a proper construction of r. 7(b), I am unable to agree with the views of the defendant in relation to the application of r. 7(b) above. To the best of my knowledge and belief, it has become an established practice of the Court not to keep the reserve price as a guarded secret but instead to state specifically, in the Proclamation of Sales, the reserve price which must first be approved by the Deputy Registrar, having regard to the valuation report tendered and admitted in the proceedings pertaining to summons for direction. The openness of the reserve price is founded very firmly and strongly upon statutory provisions e.g:

a) *Section 4 of the Enactment*

(i) **Section 4(d) requires the disclosure of:**

every other thing which it may be considered material for a purchaser to know in order to Judge the nature and value of property"; and

(ii) **Under s. 4(iv)**

such notice of sale or such statement of particulars and conditions of sale may expressly state that the sale is subject to reserve price...

b) *Section 257(d) of National Land Code 1965 provides that:*

Every order for sale by the Court under s. 256 shall:

(d) require the Registrar of the Court to fix a reserve price for the purpose of the sale being a price equal to the estimated market value of the land or lease in question.

c) *The Johor Conditions of Sale*

> Paragraph 1: the highest bidder shall be the purchaser and if any dispute shall arise as to any bidding the property shall be put up again at the last undisputed bidding. There shall be a reserve price.
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> (The conditions of sale pertaining to both auctions specifically stated that the subject properties are sold subject to the general condititons of sale known as the Johor Conditions of Sale).

In the circumstances, I am of the considered view that the contention of the defendant in imposing an element of secrecy in the reserve price of the property for public auction as a prerequisite or precondition for the application of r. 7(b) is not supportable in law nor is it in consonance with the established rules of construction applicable in relation to a subordinate or delegated legislation.

The construction of a subordinate or delegated legislation has been explained in a number of decisions of the Courts. In *Hirendra Lal Bannerji v. Chin Cheng Realty (Pte) Ltd.* [1986] 1 MLJ 220. Lai Kiew Chai. J (of the Singapore High Court) held that:

> ... in the construction of any statutory enactment or subsidiary legislation or any other document, the cardinal rule for its construction is that it should be construed according to the intention as expressed in the legislation or document itself. If the words in the legislation or document are themselves precise and unambiguous, there is no room for any construction other than one expounding those words in their ordinary and natural meanings. At the same time, it is equally clear that, in those circumstances, the language has to be given effect, whatever may be the consequences. For both propositions, see Lord Blackburn in *The Direct United States Cable Co. Ltd. v. The Anglo-American Telegraph Co. Ltd.* and Tindal CJ in *Warburton v. Loveland*.

Where an expression is used in any form of legislation, it must be interpreted in accordance with the ordinary canons of interpretation. (See *Ipoh Town Council & Anor. v. Ng Khoon Khoon* (NO. 2) 1960 MLJ 227).

Upon a proper construction of r. 7(b), I hold that it does not contemplate the concealment of or the retention of any degree of secrecy in the reserve price from any prospective or intending bidder. It has always been made public as the term "public auction" requires, by way of written Proclamation of Sale posted on the notice boards of the Court or in the daily newspapers for public knowledge and consumption. In the circumstances, it is not open to the defendant to construe r. 7(b) by importing into this rule the element of secrecy in the reserve price in order to render the provisions of r. 7(b) inoperable or inapplicable to the undisputed facts of this case.

Again in relation to r. 7(b) the words "**where property is put up by public auction** but no sale takes place by reason of the reserve price not being reached ..." must in my view be given their natural and ordinary meaning, which in effect contemplate that the auction has already commenced. Once the auction has commenced, two situations may arise *viz*:

(a) there are no bidders (in which event, the reserve price can never be reached) and consequently there is no sale;

or

(b) there are bidders but nevertheless the bidding did not reach the reserve price (in which event no sale can take place, by reason of the reserve price not being reached).

In both these situations, the reserve price is invariably disclosed.

In *United Malayan Banking Corporation Berhad v. Indah Sejati Sdn. Bhd.* [1992] 1 AMR 41, the Johor Bahru High Court (albeit obiter) has stated that under the Auction Rules the auctioneer receives a fee of ½% on the value of property (i.e. based on scale and not based on the "discretionary powers" of the Registrar).

(2) *Rule 7(a)*

In relation to the construction to be placed on r. 7(a), it is my considered view that the discretion as stated therein cannot be exercised by stipulating a fixed sum viz RM100 without hearing the auctioneer, as each case has to be considered on its merit judicially and on established principles having regard to various factors such as the properties involved, the time expended and whether any special skill was exercised etc. See *Re Wolfe, Heller v. Wolfe* [1952] 2 AER 545. There is no evidence that the defendant has given the auctioneer the opportunity of presenting his views when the defendant drastically reduced the fees payable from the scale fee under r. 7(b) to the "fee" which the defendant thought fit to pay under r. 7(a) or under the said circular. There is therefore no proper exercise of the discretion in this case.

5. *Inherent Jurisdiction of the Court*

The defendant also relies on the inherent jurisdiction of the Court in fixing the quantum of commission.

In my considered opinion, the inherent jurisdiction of the Court under O. 92, r. 4 cannot be used to deny the plaintiff of any legal right that may be vested in him under r. 7(b). Inherent jurisdiction under the rules of Court is a procedural rule and is not intended to alter substantive rights. In *Suppuletchimi a/p Karpaya v. Palmco Bina Sdn. Bhd.* [1994] 2 CLJ 561, Vincent Ng Kam Khoay, J had the occasion to consider the meaning of the phrase "inherent jurisdiction of the Court", which:

> was considered in the Singapore case of *Heng Joo See v. Ho Poi Ling* (Divorce Petition No. 94 of 1993) wherein Coomaraswamy J restated with approval the definition put forward by Sir Jack Jacob, the former Senior Master of the Supreme Court in his article, 'The inherent jurisdiction of the Court' [1970] CLP 23 at p. 51 which reads as follows:
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> > ... the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

I hold that the inherent jurisdiction of the Court must be applied to do justice to the parties and to secure fairness in a trial between them but not for any other purpose such as taking away the substantive rights of the auctioneer in this case.

6. *Ultra Vires*

The said circular purports to make rules and to prescribe the fees due and payable to a licensed auctioneer having conduct of auction sales in the Johor Bahru High Court. The power to make rules has been conferred upon the Minister under s. 12 of the Auction Sales Enactment 1932. Section 12(a) says that the Minister may makes rules to prescribe the fees payable and the nature and amount of the security to be given under the Enactment. A Deputy Registrar has not been conferred with this regulation or rule-making power. Pursuant to r. 12(a) and in exercise of the powers vested in him by this section, the Minister has made the Auction Sales Enactment Rules to provide for and prescribe, *inter alia*, the fees

payable under the said rules. Although r. 5 gives the Registrar a discretion to approve any special rate of remuneration either higher or lower than that provided in the scale, that discretion must be exercised judicially and according to established principles. Rule 5 does not in effect give legislative powers to the Deputy Registrar. In issuing the circular purporting to prescribe fees for the licensed auctioneers in the Johor Bahru High Court, the Deputy Registrar has indeed exceeded her powers under the Enactment or the Rules made thereunder and cannot be upheld. The circular is *ultra vires* the Enactment and the Rules, null and void and of no effect whatsoever. In the circumstances, I make an order in terms of this application. At the request of learned Counsel for the auctioneer, I make no order as to costs in this case.

A declaration that the said circular is null and void is bound to affect the fees of all the auctioneers which were paid pursuant to the said circular which purportedly took effect from 6 August 1992. With a view to avoiding any difficulty, hardship or inconvenience which may arise therefrom, pertaining to previous bills of the auctioneers who were dealt with pursuant to the said circular, I hereby apply the doctrine of prospective overruling in this case, as has been applied by the Supreme Court in *PP v. Dato Yap Ping* [1983] 2 MLJ 311 at 320 & 323, where Abdoolcader SCJ (as he then was) said:

> The general principle of retroactivity of a judicial declaration of invalidity of a law was overturned by the Supreme Court of the United States of America in *Linkletter v. Walker* [34] (at p. 628) when it devised the doctrine of prospective overruling in the constitutional sphere in 1965 as a practical solution for alleviating the inconveniences which would result from its decision declaring a law to be unconstitutional, after overruling its precious decision upholding its constitutionality. This doctrine was applied by the Supreme Court of India in *L.C. Golak Nath v. State of Punjab & Anor.* [35] (at pp. 1666-1669). The doctrine - to the effect that when a statue is held to be unconstitutional, after overruling a long-standing current of decisions to the contrary, the Court will not give retrospective effect to the declaration of unconstitutionality so as to set aside proceedings of convictions or acquittals which had taken place under that statute prior to the date of the judgment which declared it to be unconstitutional, and convictions of the impugned statute previously will accordingly not be disturbed - can be applied by the Supreme Court as the highest Court of the country in a matter arising under the Constitution to give such retroactive effect to its decision as it thinks fit to be moulded in accordance with the justice of the cause or matter before it - to be adhibited however with circumspection and as an exceptional measure in the light of the circumstances under consideration.
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> In England this doctrine has been recognised by the House of Lords by necessary implication in the Practice Statement (Judicial Precedent)[40] issued by Lord Gardiner LC on behalf of himself and the Lords of Appeal in Ordinary on 26 July 1966. More recently, in *Jones v. Secretary of State for Social Services*,[37] two Judges of the House of Lords, Lord Diplock (at p. 1015) and Lord Simon of Glaisdale (at p. 1026) were prepared to consider the application of the American doctrine of prospective overruling to England. In *Choice Investments Ltd. v. Jeromnimon*[38] Lord Denning MR in his judgment in the English Court of Appeal at (p. 84) accepted the subsistence and application of the doctrine. In *Defrenne v. Sabena*[39] the Court of Justice of the European Communities applied the doctrine of prospective overruling predicated on conditions of legal certainty which required the Court, as an exceptional measure, to declare the law for the future only.
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> At the conclusion of argument of 19 March 1987, the Court accordingly by a majority (Tun Mohamed Salleh Abas LP, and Tan Sri Hashim Yeop A. Sani SCJ dissenting) declared s. 418A to be unconstitutional and void as being an infringement of the provisions of Art. 121(1) and applied the doctrine of prospective overruling so as not to give retrospective effect to

declaration made with the result that all proceedings of convictions or acquittals which had taken place under that section prior to the date of our judgment in this matter would remain undisturbed and not be affected, and appeal was dismissed on this basis.

In the instant case, I make an order and declare that my judgment herein is effective in relation to the auctioneer in this matter and to all other auctioneers who make their respective claims for their fees in respect of all auction sales conducted on or after the date of the judgment herein while fees claimed by auctioneers in respect of all auction sales before the date of this judgment will remain undisturbed and not be affected.